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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

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9 William C. Mach, ) No. CV 11-1734-PHX-DGC (MEA)  
10 Plaintiff, )  
11 vs. ) **ORDER**  
12 Director Charles Ryan, et al., )  
13 Defendants. )14

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15 Plaintiff William C. Mach filed this *pro se* civil rights action pursuant to 42 U.S.C.  
16 § 1983 and invoked supplemental jurisdiction over a state law claim (Count III). (Doc. 1.)  
17 Defendants Kendal and Ryan move for partial dismissal under Federal Rule of Civil  
18 Procedure 12(b)(6) for failure to state a claim, asserting that, as to the state-law claim,  
19 Plaintiff did not file a notice of claim and that punitive damages are not available. (Doc. 12.)

20 The Court will grant the motion as to punitive damages. As to the notice-of-claim  
21 issue, the Court will deny the motion without prejudice to resubmitting it as a motion for  
22 summary judgment.

23 **I. Background**

24 In Count I, Plaintiff alleged that in violation of the Eighth Amendment, he was refused  
25 surgery for an inguinal hernia. (Doc. 1.) In Count III, Plaintiff asserted that Defendants  
26 charge him a fee for his visits to the health clinic and that this fee “established a contractual  
27 relationship with Plaintiff, whereby Defendants agreed to provide medical care according to

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1 the norms established by the medical profession in the community at large.” (*Id.*) Plaintiff  
2 claimed that Defendants have breached the contract.

3 **II. Motion to Dismiss**

4 Defendants move to dismiss Count III for failure to state a claim. (Doc. 12.) In  
5 support of the argument on the notice of claim, they submit the declaration of Chris Austin  
6 of the Attorney General’s Civil Division attesting that a review of the Notice of Claim Log  
7 and the Notice of Claim File show that Plaintiff has not filed notices of claims regarding  
8 breach of contract for medical treatment. (Doc. 13, Ex. 1, ¶¶ 2, 6.)

9 Plaintiff did not respond to the motion, although advised of his obligation to do so.  
10 (Doc. 15.) Rather, he filed a Motion to Strike Pleadings, arguing that Defendants were in  
11 default. (Doc. 17.) The Motion to Strike was denied January 6, 2012. (Doc. 21.) He also  
12 sought a default judgment, which was denied. (Docs. 11, 16.)

13 **A. Notice of Claim**

14 As to the notice-of-claim issue, the Court will deny the motion without prejudice.  
15 First, the Court has already screened the Complaint pursuant to 28 U.S.C. § 1915A(a), which  
16 uses the same standard as Rule 12(b)(6), *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir.  
17 2000), and found that it states claims against Defendants. Second, Defendants argue that  
18 Plaintiff did not allege in his Complaint that he filed a notice of claim and he did not attach  
19 one to the Complaint. (Doc. 12 at 4.) But Defendants provide no authority for the argument  
20 that Plaintiff must plead that he filed a notice of claim. Failure to file a notice of claim is an  
21 affirmative defense. *See Lee v. State*, 242 P.3d 175, 180 (Ariz. App. Div. 2010). In addition,  
22 courts will not normally look beyond the pleadings in resolving a Rule 12(b)(6) motion. *Lee*  
23 *v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). While a court may consider  
24 matters of public record, including pleadings, orders, and other papers filed with the court,  
25 *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (*abrogated on other*  
26 *grounds* by *Astoria Fed. Savings and Loan Ass’n v. Solimino*, 501 U.S. 104 (1991)),  
27 Defendants provide no authority for considering the declaration. Finally, because Plaintiff  
28 would have to produce a copy of the notice of claim that he may have filed, the Court

1 believes Plaintiff should have received a notice pursuant to Rand v. Rowland, 154 F.3d 952,  
2 962 (9th Cir. 1998) (*en banc*), advising him of the need to provide relevant documentation;  
3 because Defendants filed their motion as one under Rule 12(b)(6), the Court did not provide  
4 a Rand notice. (See Doc. 15.)

5 **B. Punitive Damages**

6 Defendants also argue that under Ariz. Rev. Stat. § 12-820.04 “[n]either a public  
7 entity nor a public employee acting within the scope of his employment is liable for punitive  
8 or exemplary damages.” Furthermore, under Ariz. Rev. Stat. § 41-621(k) “[t]he state and its  
9 departments, agencies, boards and commissions are immune from liability for losses arising  
10 out of a judgment for willful and wanton conduct resulting in punitive or exemplary  
11 damages.”

12 As noted, Plaintiff does not respond to this argument. The allegations in the  
13 Complaint, taken as true, indicate that Defendants were acting within the scope of their  
14 employment. The claims for punitive damages in Count III will be dismissed.

15 **IT IS ORDERED:**

16 (1) The reference to the Magistrate Judge is withdrawn as to Defendants’ Motion to  
17 Dismiss (Doc. 12).

18 (2) Defendants Motion to Dismiss (Doc. 12) is **granted in part and denied in part**  
19 as follows:

20 (a) **granted** as to punitive damages in Count III, and the claim for punitive damages  
21 in Count III is dismissed; and

22 (b) **denied without prejudice** as to the notice-of-claim issue.

23 DATED this 23<sup>rd</sup> day of February, 2012.

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27 David G. Campbell  
28 United States District Judge